

MAY 17 1993

**Commission**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**OFFICE OF THE SECRETARY**

Washington, D.C. 20554

**THE FIDELIO GROUP, INC.,**

File No.  
RPH-910507MO

**I. THE EXCLUSION OF EQUAL EMPLOYMENT  
OPPORTUNITY ISSUES FROM THE HEARING**

Neither the Bureau's nor GAF's *Opposition* offers any valid justification for the prejudicial effect of the HDO's unexplained separation of all EEO matters from the hearing proceeding. The mere recitation of the fact that "no determination had been made [by the Commission] as to whether Guild raised a substantial and material question about WNCN(FM)'s EEO program and practices," Bureau *Opposition* at 2, cannot justify adjudicating other issues

*very same case* certain issues which it recognizes it may be required to designate for hearing under the applicable statutory standard. 47 U.S.C. § 309(e).

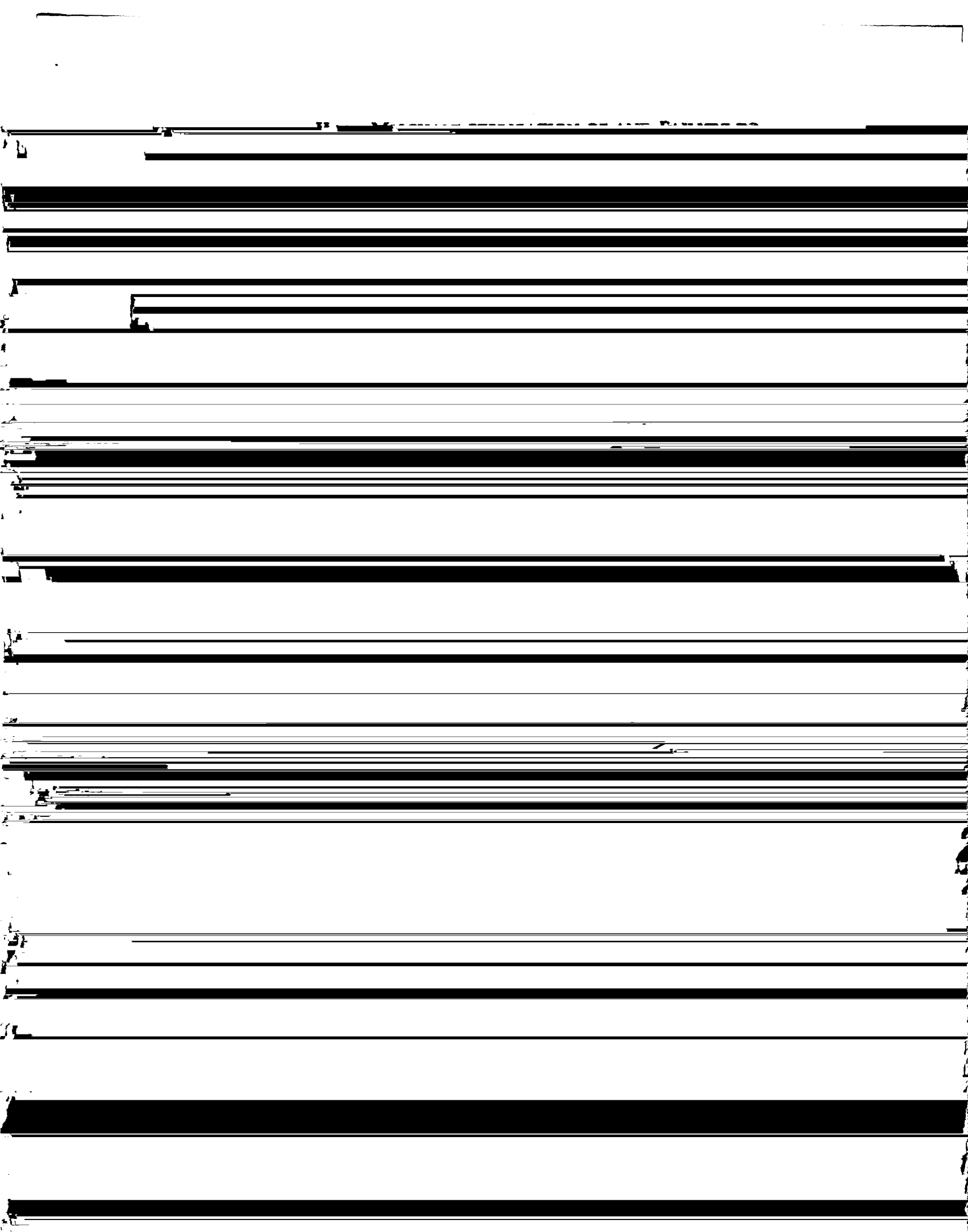
The injustice of the Commission's bifurcation of this proceeding is even more clearly inappropriate in light of the recent revelation (in a document not recited as being before the Commission when the *HDO* was adopted) of the fact that GAF's pleadings contained false statements concerning its EEO performance. The Bureau's *Opposition* totally ignores this new information, and GAF tries to minimize its impact, largely through a claim that it had "fully explained" the underlying circumstances. *GAF Opposition* at 4. That is simply not true. GAF's *Opposition* and its earlier pleading do not offer any explanation of those circumstances; they merely state that the current General Manager (and another GAF employee) concluded that a particular GAF employee should be included in a different reporting category than as previously reported to the Commission and as discussed in prior pleadings herein. It is particularly significant that no affidavit has been offered by GAF to confirm how the information came to be falsely reported in the first place, and when its falsity was discovered.

As the questions raised in the Guild's *Petition for Reconsideration* concerning GAF's false EEO report and pleading relate to matters peculiarly within GAF's knowledge, GAF should not be permitted to withhold the relevant information from the Commission without raising an inference that the information so withheld is adverse to it. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221-22 (1939). This is especially so where, as here, there are numerous factors suggesting why GAF might have been motivated to

exaggerate its EEO performance and indicating the unlikelihood that this was merely an oversight on GAF's part.

Among these relevant circumstances are: (1) the Commission's attachment of EEO reporting conditions to GAF's 1978 renewal (Letter of William Tricarico to Robert E. Richer, Dec. 21, 1978); (2) the filing by NAACP, *et al.*, on May 1, 1991 of a *Petition to Deny*, alleging noncompliance by GAF with its EEO obligations; and (3) the issuance on May 10, 1991 by the Commission's EEO Branch of a letter of inquiry requiring GAF to provide information concerning its EEO program and practices. The Guild respectfully submits that under these circumstances GAF must be required to do more than rely on *unsworn non-explanations* of its conduct.

Finally, the Guild notes with concern the most recent developments in the hearing proceeding, including the dismissal of one of the competing applications aawal of the other. under circumstances which the Guild believes have largely been created by the unfairness of the HDO in forcing the competing applicants to proceed, at considerable cost, well in advance of the ultimate determinations as to whether issues will be designated against GAF (as a result of actions of the D.C. Circuit and/or the EEO Branch) This atmosphere of inhospitality to the public, as well as to competing applicants, recalls the era that preceded *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).



the promise of changing that name as bait to avoid having information and arguments adverse to it reach the Commission.

Similarly, the Commission need not adjudicate the enforceability of the confidentiality agreement between GAF and the Guild — except insofar as it may violate *Commission* policy for a licensee to insist upon enforcement of such an agreement in order to prevent material information from reaching the Commission in derogation of its duty of candor. It is hard to see how that issue could possibly be for any tribunal but the Commission to decide.

Although the Guild's allegations have been somewhat "cryptic," GAF *Opposition* at 7, that is principally the result of GAF's refusal to permit full disclosure to the Commission of the non-privileged material on which the Guild's claims are based in part. It is not correct, however, to call the Guild's allegations "unsupported." *Id.* In fact, the substantive allegations of the *Petition for Reconsideration*, like those in the Guild's prior pleadings, are supported by affidavit or affirmation. See *Guild Petition for Reconsideration* at 6 & Aff. of David M. Rice. That is more than can be said for virtually any of GAF's pleadings in this and prior proceedings before the Commission

### III. PROCEDURAL MATTERS

The Guild's *Petition for Reconsideration* was filed in full compliance with the Commission's Rules, 47 C.F.R. § 1.106 (1992), and thus cannot be viewed (as the Bureau vaguely hints, *Opposition* at 3-4) as an application for review, much less an untimely one. Moreover, there is no basis for GAF's complaint that the Guild continues to press for a hearing on issues originally raised in a

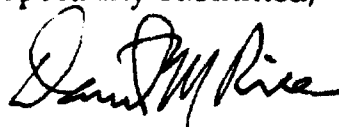
prior proceeding, *GAF Opposition* at 8. The Commission's decision in that proceeding is presently on appeal before the U.S. Court of Appeals for the D.C. Circuit, and a reversal therein presumably would require addition of issues in the present proceeding. It is surely appropriate for the Guild to refuse to abandon its position with respect thereto. Indeed, the Guild has already expressed its belief that the present hearing proceeding should be held in abeyance to await the outcome of that appeal. See the Guild's *Comments on Opposition to Motion for Deferral of Procedural Dates*, May 6, 1993.

#### CONCLUSION

In light of the foregoing, reconsideration of the *HDO* should be granted, and upon such reconsideration the Guild's *Petition to Deny* should be designated for hearing on each of the issues alleged therein, and the Guild should be named as a party to the consolidated hearing on the above-captioned applications.

Dated: May 17, 1993

Respectfully submitted,



---

David M. Rice  
One Old Country Road  
Carle Place, New York 11514  
(516) 747-7979

Attorney for Listeners' Guild, Inc

Before the  
**Federal Communications Commission**

Washington, D.C. 20554

.....  
In re Applications of )

GAF BROADCASTING COMPANY, INC., )

For Renewal of License of Station )  
WNCN (FM), New York, New York )

CLASS ENTERTAINMENT AND )  
COMMUNICATIONS, L.P. )

THE FIDELIO GROUP, INC., )

For a Construction Permit for a New FM Station )  
on 104.3 MHz at New York, New York )  
..... )

MM Docket No. 93-54

File No.  
BRH-910201WL

File No.  
BPH-910430MF

File No.  
BPH-910502MQ

To: The Commission

STATE OF NEW YORK )  
COUNTY OF QUEENS ) Ss:

DAVID M. RICE, an attorney admitted to the bar of the State of New York,  
hereby affirms, under penalty of perjury, as follows:

I am the attorney for Listeners' Guild, Inc., the Petitioner herein. In that capacity I have participated both in the preparation of the annexed *Consolidated Reply to Oppositions to Petition for Reconsideration* and in events referenced therein. To the best of my knowledge, information and belief the allegations of the *Consolidated Reply* are true and correct.



I declare and affirm under penalty of perjury that the foregoing is true and correct.

Executed on May 17, 1993.

A handwritten signature in cursive script, appearing to read "David M. Rice", is written above a horizontal line.

David M. Rice

**CERTIFICATE OF SERVICE**

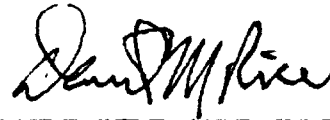
I, DAVID M. RICE, hereby certify that the foregoing "CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION" was served this 17th day of May, 1993, by mailing a true copy thereof by United States first class mail, postage prepaid, to each of the following:

The Honorable Joseph Chachkin  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W. — Room 226  
Washington, D.C. 20554

John I. Riffer, Esq.  
Associate General Counsel  
Adjudication Division  
Office of General Counsel

Morton L. Berfield, Esq.  
Cohen and Berfield, P.C.  
1129 Twentieth Street, N.W.  
Washington, D.C. 20036

Harry F. Cole, Esq.  
Bechtel & Cole  
1901 L Street, N.W.  
Washington, D.C. 20037

A handwritten signature in black ink, appearing to read "David M. Rice". The signature is fluid and cursive, with the first name "David" and last name "Rice" being clearly legible. It is positioned above a horizontal line.

---

David M. Rice